

## COMMENTS

### The West German Day-Fine System: A Possibility for the United States?

Through two reforms enacted in 1969,<sup>1</sup> the West German federal parliament revitalized the fine as a criminal sanction. The First Criminal Law Reform Act mandated that the fine be the primary sanction for crimes formerly punishable by a prison term of six months or less.<sup>2</sup> The Second Criminal Law Reform Act strikingly changed the method of calculating the fine amount. Under the new method, modeled on the Scandinavian "day-fine" system,<sup>3</sup> the fine for any particular crime is not a fixed sum but is a variable figure adjusted to the wealth and income of the offender.<sup>4</sup> Whereas a fixed fine could impose severe economic hardship on a poor offender but cause nothing more than a minor reduction in consumption for the offender of means, the West German variable fine

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<sup>1</sup> Erstes Gesetz zur Reform des Strafrechts (First Criminal Law Reform Act) of June 25, 1969 [1. StrRG], 1969 Bundesgesetzblatt [BGBl] I 645 (W. Ger.) [hereinafter cited as First Criminal Law Reform Act]; Zweites Gesetz zur Reform des Strafrechts (Second Criminal Law Reform Act) of July 4, 1969 [2. StrRG], 1969 BGBl I 717 (W. Ger.) [hereinafter cited as Second Criminal Law Reform Act]. The Second Criminal Law Reform Act did not go into effect in its final version until January 1, 1975. Bekanntmachung der Neufassung des Strafgesetzbuches (proclamation of the new criminal code) of Jan. 2, 1975, 1975 BGBl I 1 (W. Ger.).

<sup>2</sup> See First Criminal Law Reform Act, *supra* note 1, § 14 (codified at Strafgesetzbuch (criminal code) [StGB] § 47 (W. Ger. 1975)).

<sup>3</sup> Eser, *The Politics of Criminal Law Reform: Germany*, 21 AM. J. COMP. L. 245, 256 (1973). For a description of the system in Sweden, see Thornstedt, *The Day-Fine System in Sweden*, 1975 CRIM. L. REV. 307, 307.

<sup>4</sup> See *infra* notes 39-50 and accompanying text. The idea of adjusting fines to the means of the offender has gained popularity in the twentieth century, see *infra* note 6, but the idea itself is not a new one. See Note, *Fines and Fining—An Evaluation*, 101 U. PA. L. REV. 1013, 1024 (1953). For example, in thirteenth-century England, the amount of an amercement was fixed with regard to the offender's wealth. *Id.* at 1024 & n.86. Jeremy Bentham advocated variable fines in his work *THE THEORY OF LEGISLATION* 217 (U. Baxi ed. 1975) (1st ed. Paris 1802) ("Pecuniary punishments should always be regulated by the fortune of the offender. The relative amount of the fine should be fixed, not its absolute amount . . ."), quoted in Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 415 n.17 (1980).

is designed to have a proportionate impact across all economic strata.<sup>6</sup>

The West German and, indeed, general European<sup>6</sup> reliance on the variable fine has not gone unnoticed by American commentators.<sup>7</sup> Against the backdrop of overcrowded<sup>8</sup> and costly<sup>9</sup> prison systems, American commentators have seen the European day-fine as a panacea for America's troubled correctional systems.<sup>10</sup> Those rec-

<sup>6</sup> See *infra* notes 42-44 and accompanying text.

<sup>7</sup> In the twentieth century, the day-fine has been legislatively adopted in several Scandinavian nations. Finland enacted it in 1921. Sweden and Denmark followed in 1931 and 1939 respectively. Thornstedt, *supra* note 3, at 307. Austria adopted the day-fine simultaneously with West Germany in 1975. Austria's adoption was profoundly influenced by the West German proposal and the arguments of its proponents. Driendl, *Entwicklung und Neuregelung der Geldstrafe nach dem Tagessatzsystem in Österreich*, in *DIE GELDSTRAFE IM DEUTSCHEN UND AUSLÄNDISCHEN RECHT* 659, 663-65 (H.-H. Jescheck & G. Grebing eds. 1978). In 1938 Cuba also adopted the day-fine system. Note, *supra* note 4, at 1024-25 & n.92.

This comment focuses on West German practice for two reasons. First, among all European nations currently using day-fines, West Germany is the principal nation to have adopted the system within the last decade, see *supra* note 1, and therefore is well suited for analyzing the problems of a contemporary adoption of the variable fine. Second, the West German adoption was preceded by a protracted and well-documented academic discussion detailing the advantages of the day-fine over incarceration. See *infra* notes 12-35 and accompanying text. The American reader thus can glean from the West German discussion the arguments supporting the day-fine.

<sup>8</sup> See, e.g., N. MORRIS, *THE FUTURE OF IMPRISONMENT* 8 (1974); Carter & Cole, *The Use of Fines in England: Could the Idea Work Here?*, 63 *JUDICATURE* 154 (1979); Gillespie, *Fines as an Alternative to Incarceration: The German Experience*, *FED. PROBATION*, Dec. 1980, at 20.

<sup>9</sup> High inmate density has been one of the factors that have led federal courts to hold entire state prison systems in violation of the Constitution. See, e.g., *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (Mississippi); *Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir.), *cert. denied*, 438 U.S. 915 (1977); *Hamilton v. Schiro*, 338 F. Supp. 1016 (E.D. La. 1970); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

<sup>10</sup> The combined cost to society of prisoner maintenance and lost labor has been estimated to lie between \$50,000 and \$80,000 per prisoner per year. M. SHERMAN & G. HAWKINS, *IMPRISONMENT IN AMERICA* 2 (1981).

<sup>11</sup> See, e.g., N. MORRIS, *supra* note 7. Morris writes:

[T]here has been an overemphasis on custody. It is widely recognized that we have locked up too many social nuisances who are not social threats, too many petty offenders and minor thieves, severing such few social ties as they have and pushing them further toward more serious criminal behavior. This excessive use of incarceration, the prison and the jail, the reformatory and the detention center, has been expensive, criminogenic, and unkind.

*Id.* at 7-8. As a replacement for short-term imprisonment, Morris recommends, *inter alia*, the day-fine:

There is also support for increased reliance on the fine and on restitution and compensation payments to the victims of crimes as an alternative to imprisonment. This is a wholly sound development which should be extended by the adoption of systems like the Swedish "day fine" and time payment arrangements adjusted to the economic real-

ommending adoption of the West German practice, however, have evaluated West Germany's practical experience with the day-fine system in a cursory manner.<sup>11</sup> This comment provides a more comprehensive evaluation of the West German experience. Part I examines the impetus to reform and the resulting statutes. Part II describes West Germany's experience under the new laws and concludes that although the day-fine system in West Germany in some respects has fallen short of the goals of the reformers, the West German courts have reduced their use of short-term imprisonment and have succeeded in collecting most of their fines. The comment then turns to the United States and identifies some factors that could make American experience with a day-fine system different from that of West Germany.

## I. THE REFORMS

### A. History of the Reform Legislation

The West German government formed a Grand Commission ("*Grosse Strafrechtskommission*") in 1954 to revise the then-ex-

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ities of the lives of convicted persons.

*Id.* at 8. Similarly, Carter & Cole, *supra* note 7, write that

[p]olicymakers should consider the expanded use of the fine, especially for those first offenders who now are given probation or a suspended sentence. In many states, the probation officer's caseload is so great that the only persons who receive any type of supervision are those who have been convicted of the most serious offenses; as a result, probation as an alternative to incarceration has become something of a joke. . . . Would not a fine be more consistent with the concepts of deserved punishment and deterrence?

*Id.* at 161 (footnote omitted).

<sup>11</sup> For example, Gillespie, *supra* note 7, offers statistics showing a decrease in the total number of short-term prison sentences handed down by West German courts since the reform, a relatively stable number of convictions, *id.* at 21, and a low level of default imprisonment, *id.* at 23, and then baldly asserts that "[a]n overall assessment of the German experience, as it relates to the substitution of fines for incarceration, is that it has accomplished its goal without either a significant cost in terms of higher rates of crime or incarceration for fine default," *id.* at 24. The statement is misleading and incomplete. It is misleading because a decrease in the total number of short-term sentences could be the result of imposing fines for one particular type of crime—for example, traffic crime—formerly punishable by imprisonment. Accomplishment of the reform's goal—reducing the number of short-term prison sentences as a sanction for all crimes, *see infra* notes 20-23 and accompanying text—would have to be evidenced by a decrease in the number of short-term prison sentences handed down for all crimes, including those traditionally punished by a prison term.

Gillespie's statement is incomplete because an "overall assessment" of the West German experience should certainly "relate" to more than the replacement of incarceration with fines. One would like to know whether West German courts accurately adjust fines to offender means, whether West German courts have access to information about offender wealth, and whether such information, if available, is reflected in the fine amount.

isting Criminal Code, which had been in force since 1871.<sup>12</sup> After eight years, the Commission issued the Draft Penal Code E 1962<sup>13</sup> ("E 1962"). The draft included provisions allowing fines to replace short-term imprisonment and requiring the fines to be calculated on a per diem basis.<sup>14</sup> In particular, E 1962 mandated that a fine be imposed in lieu of imprisonment of up to three months "if . . . the fine will suffice to . . . warn[] . . . the perpetrator, and neither the degree of guilt nor the purpose of punishment to deter crimes requires imprisonment."<sup>15</sup>

Many criminal law scholars at West German and Swiss universities criticized E 1962 severely<sup>16</sup> and published their own Alternative Draft Code,<sup>17</sup> which was introduced as a bill by the Free Democratic Party.<sup>18</sup> The Alternative Draft's authors had hoped that the Commission would eliminate the abstract understanding of punishment they perceived in the 1871 Code and substitute a purposeful penological program in its stead.<sup>19</sup> They were particularly disap-

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<sup>12</sup> Gillespie, *supra* note 7, at 20. The Code of 1871 was the product of Germany's nineteenth-century law codification movement. J. BAUMANN, *KLEINE STREITSCHRIFTEN ZUR STRAFRECHTSREFORM* 14-15 (1965). The only criminal code common to the German states prior to 1871 dated back to the sixteenth century. *Id.* at 15.

<sup>13</sup> Entwurf eines Strafgesetzbuches, E 1962 (draft of a criminal code, E 1962), DRUCKSACHEN DES DEUTSCHEN BUNDESTAGES [BTDRUCKS.] 4/650 (W. Ger. 1962) [hereinafter cited as Entwurf eines Strafgesetzbuches]. The draft is available in English under the title *THE GERMAN DRAFT PENAL CODE E 1962* (N. Ross trans. 1966) [hereinafter cited as E 1962].

<sup>14</sup> See E 1962, *supra* note 13, §§ 51, 53.

<sup>15</sup> *Id.* § 53(1).

<sup>16</sup> See Baumann, *Vorwort*, in *MISSLINGT DIE STRAFRECHTSREFORM?* 7, 7 (J. Baumann ed. 1969); Gillespie, *supra* note 7, at 20; Grebing, *Die Geldstrafe im deutschen Recht nach Einführung des Tagessatzsystems*, in *DIE GELDSTRAFE IM DEUTSCHEN UND AUSLÄNDISCHEN RECHT* 13, 37-38 (H.-H. Jescheck & G. Grebing eds. 1978). Jürgen Baumann, one of the principal critics of E 1962, characterized the Commission's work as "dusty, petty-bourgeois, pecksniffian, in many ways mendacious and trampling underfoot the sensitivities of numerous citizens, replete with pedantry and perfectionism." Eser, *supra* note 3, at 247 (quoting J. BAUMANN, *supra* note 12, at 29). Baumann acknowledged that his language was too strong. J. BAUMANN, *supra* note 12, at 29.

<sup>17</sup> ALTERNATIV-ENTWURF EINES STRAFGESETZBUCHES, Allgemeiner Teil (alternative draft criminal code, general part) (W. Ger. 1966). The draft is available in English under the title *ALTERNATIVE DRAFT PENAL CODE FOR THE FEDERAL REPUBLIC OF GERMANY* (J. Darby trans. 1977) [hereinafter cited as *ALTERNATIVE DRAFT*].

<sup>18</sup> Eser, *supra* note 3, at 248.

<sup>19</sup> The Alternative Draft's authors criticized E 1962 primarily for being an inadequate departure from the 1871 Code. See J. BAUMANN, *supra* note 12, at 22. See also *ALTERNATIVE DRAFT*, *supra* note 17, at 35-36 (commentary by J. Baumann) ("In contrast to the 1962 government draft, the Alternative Draft was not so much designed to 'advance' the theory of criminal law."). The 1871 Code had been written under the strong influence of Prussian penological thinking and at its core mirrored the Prussian Criminal Code of 1851. J. BAUMANN, *supra* note 12, at 15. Following its Prussian predecessor, the 1871 Code stressed the accountability of the individual for his free choice to commit illegal acts. The Code defined each crime distinctly and prescribed harsh penalties. Baumann contended that the 1871

pointed by E 1962's failure to eliminate the short-term prison sentence,<sup>20</sup> which, according to the Alternative Draft's authors, could not be reconciled with any rehabilitative goal. They argued that short-term imprisonment, rather than facilitating the offender's return to noncriminal activity upon release, breaks whatever positive ties the offender had to society and pushes him further into the criminal class.<sup>21</sup> Accordingly, the Alternative Draft eliminated short-term imprisonment and set six months as the *minimum* prison term.<sup>22</sup> To replace short-term prison sentences, the Alternative Draft's authors proposed fines, because fines punish by reducing the offender's ability to consume without forcing the offender to break all positive social ties.<sup>23</sup>

The First Criminal Law Reform Act effected a compromise between the Alternative Draft and E 1962.<sup>24</sup> The new law did not adopt the Alternative Draft's proposed abolition of short-term imprisonment altogether, but, unlike E 1962, it established an extremely strong presumption against such imprisonment. As codified, the legislation directs the courts to impose prison sentences of less than six months "*only* when special circumstances, present in the act or in the personality of the offender, make the imposition of the sentence indispensable for effecting an impression on the

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Code imposed punishment for the sole purpose of discharging guilt generated by the decision to commit a misdeed. In support of his view that the 1871 Code imposed punishment for abstract purposes, Baumann cited Hegel's blunt formulation that punishment is the negation of a negation. He also cited Kant's statement that even if the State voluntarily were to disband, it first would have to execute the last convicted murderer, lest his guilt adhere to the rest of society. *Id.*

<sup>20</sup> See ALTERNATIVE DRAFT, *supra* note 17, at 36-37 (commentary of J. Baumann). Although E 1962 provided for fines in lieu of imprisonment, *see supra* note 15 and accompanying text, the section so providing was inapplicable whenever "imprisonment of three months is the minimum for the prescribed punishment applied by the court in the particular case." E 1962, *supra* note 13, § 53(2).

<sup>21</sup> In remarks accompanying the Alternative Draft, Jürgen Baumann stated:

A short jail sentence does not serve to rehabilitate the offender because the period of confinement is too short to be effective. It is, however, well designed to inculcate in the offender patterns of criminal behavior. By removing him from his family and employment, the short jail sentence subjects the offender to all the dangers of a criminal environment.

ALTERNATIVE DRAFT, *supra* note 17, at 36-37. The West German federal parliament's select committee for criminal law reform made the same argument in ERSTER SCHRIFTLICHER BERICHT DES SONDERAUSSCHUSSES FÜR DIE STRAFRECHTSREFORM (the official motivation to the 1969 reform), BTDRUCKS. 5/4094, at 5 (W. Ger. 1969).

<sup>22</sup> ALTERNATIVE DRAFT, *supra* note 17, § 36(1).

<sup>23</sup> See *id.* at 44-45. E 1962 would have allowed fines to replace prison sentences, but only in substantially more limited circumstances. See *supra* note 20 and accompanying text.

<sup>24</sup> Grebing, *supra* note 16, at 39. See ALTERNATIVE DRAFT, *supra* note 17, at 37 (commentary of J. Baumann).

offender or defending the legal order.”<sup>25</sup> The reform legislation thus directs courts to impose the fine as the primary sanction even for those crimes—such as theft, fraud, and battery—traditionally penalized by imprisonment in West Germany.<sup>26</sup>

Both of the draft codes, E 1962 and the Alternative Draft, proposed variable fine systems,<sup>27</sup> but the drafts differed in how they calculated the fines. E 1962’s day-fine method separated the fine into a component adjusted for the gravity of the offense and a component adjusted for the offender’s income.<sup>28</sup> It thereby offered a calculation procedure from which both an offender and a reviewing court<sup>29</sup> could discern the reasons underlying the amount of the fine.<sup>30</sup> The formalized method of adjustment could also serve to effect equality of justice,<sup>31</sup> for without such adjustment it is not possible to ensure that fines have the same proportionate impact on affluent and poor offenders. Finally, fine adjustment can decrease the likelihood of nonpayment and reduce the costs associated with fine enforcement, because most offenders would be able to pay an accurately adjusted day-fine.<sup>32</sup>

The variable fine in the Alternative Draft was also designed to effect an equal impact on all offenders, but its authors intended the fine to replicate imprisonment outside of prison: the fine would take enough income from each offender to place him at a subsistence level.<sup>33</sup> These fines would be long-term (“*Laufzeitgeld-*

<sup>25</sup> StGB § 47(1) (“Eine Freiheitsstrafe unter sechs Monaten verhängt das Gericht *nur*, wenn besondere Umstände, die in der Tat oder Persönlichkeit des Täters liegen, die Verhängung einer Freiheitsstrafe zur Einwirkung auf den Täter oder zur Verteidigung der Rechtsordnung unerlässlich machen.”) (emphasis added). This section is a codification of the First Criminal Law Reform Act, *supra* note 1, § 14, 1969 BGBl I at 646.

<sup>26</sup> See generally *infra* notes 75-79 and accompanying text.

<sup>27</sup> See E 1962, *supra* note 13, § 51 (“Fines shall be imposed on a per diem basis. A fine shall amount to at least one per diem charge, and if a statutory provision does not provide otherwise, at most to three hundred and sixty per diem charges.”); ALTERNATIVE DRAFT, *supra* note 17, § 49(1) (“Fines shall be imposed in daily, weekly or monthly rates. The time in which fines shall be paid extends from a minimum of one day to a maximum of twenty-four months.”).

<sup>28</sup> E 1962, *supra* note 13, § 51.

<sup>29</sup> See *infra* note 60.

<sup>30</sup> See Entwurf eines Strafgesetzbuches, *supra* note 13, at 169-70 (Begründung); ERSTER BERICHT DES SONDERAUSSCHUSSES FÜR DIE STRAFRECHTSREFORM (first report of the select committee for criminal law reform), BTDRUCKS. 7/1261, at 5 (W. Ger. 1973); Grebing, *supra* note 16, at 81.

<sup>31</sup> See H.-J. ALBRECHT, STRAFZUMESSUNG UND VOLLSTRECKUNG BEI GELDSTRAFEN UNTER BERÜCKSICHTIGUNG DES TAGESSATZSYSTEMS 195 (1980); Entwurf eines Strafgesetzbuches, *supra* note 13, at 169-70.

<sup>32</sup> See H.-J. ALBRECHT, *supra* note 31, at 196.

<sup>33</sup> ALTERNATIVE DRAFT, *supra* note 17, § 49; see Grebing, *supra* note 16, at 82.

*strafen*”) and payable in installments over a period lasting up to two years.<sup>34</sup> Because this scheme was extremely cumbersome, the legislature rejected it and instead codified E 1962’s fine system in the Second Criminal Law Reform Act.<sup>35</sup>

## B. The Mechanics of the Day-Fine

Before the Criminal Law Reform Acts, West German courts merely had to “*consider* the economic circumstances of the offender” in calculating a fine.<sup>36</sup> This very general formulation allowed judges to set fines arbitrarily and made it difficult to discern whether the amount of the fine reflected the offender’s wealth or the severity of his crime.<sup>37</sup> The Second Criminal Law Reform Act restricted judicial discretion and capriciousness by establishing formal rules for fine computation.

Sections 40 through 46 of the West German Criminal Code<sup>38</sup> set forth the essential provisions of the day-fine system. The Code directs the sentencing court to set the total fine amount equal to the product of two factors.<sup>39</sup> The first factor—the number of day-fine units (“*Tagessätze*”)—measures the culpability of the offender;<sup>40</sup> it ensures that the fine reflects the gravity of the offense. In setting the first factor, the court should examine the motivation of the offender, the method by which the crime was carried out, and mitigating and aggravating circumstances.<sup>41</sup> In theory, all offenders who commit a like crime will incur the same number of day-fine units. Through the second factor—the value of the day-fine unit—the court adjusts the total fine amount to the “personal and economic circumstances of the offender.”<sup>42</sup> The court should

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<sup>34</sup> ALTERNATIVE DRAFT, *supra* note 17, § 49(1).

<sup>35</sup> StGB § 40. This section of the criminal code codifies the day-fine concepts expressed in the Second Criminal Law Reform Act, *supra* note 1, § 40, 1969 BGBl I at 722. See Grebing, *supra* note 16, at 83-84. The fine systems of the drafts differed in one other respect. The Alternative Draft would allow a court to order satisfaction of a fine through community charity work on the application of the offender. ALTERNATIVE DRAFT, *supra* note 17, § 52. E 1962 contains no similar provision.

<sup>36</sup> See Entwurf eines Strafgesetzbuches, *supra* note 13, at 169 (“Bei der Bemessung einer Geldstrafe sind die wirtschaftlichen Verhältnisse des Täters zu berücksichtigen.”) (quoting former StGB § 27(c)) (emphasis added).

<sup>37</sup> *Id.*, cited in Grebing, *supra* note 16, at 88.

<sup>38</sup> StGB §§ 40-46.

<sup>39</sup> *Id.* § 40(2).

<sup>40</sup> *Id.* § 46.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* § 40(2) (“Die Höhe des Tagessatzes bestimmt das Gericht unter Berücksichtigung der persönlichen und wirtschaftlichen Verhältnisse des Täters. Dabei geht es in der Regel von dem Nettoeinkommen aus, das der Täter durchschnittlich an einem Tag hat oder haben

set the value of each day-fine unit equal to some fraction of the offender's average net daily income.<sup>43</sup> The West German Criminal Code does not specify what fraction the court is to use for this calculation, but the fraction cannot be so high as to deprive the offender or his dependents of a minimal living standard.<sup>44</sup> If, for example, the day-fine unit equals one-third of the offender's net daily income,<sup>45</sup> his deed is sufficiently serious to merit twenty day-fines, and his net daily income is sixty marks, then the total fine will be 400 marks ( $20 \times \frac{1}{3} \times 60$ ). If, however, the offender earns only fifteen marks per day, then the fine will amount to only 100 marks.

Because the criminal code mandates that both the number of day-fine units and the value of each unit be published in the court's decision,<sup>46</sup> the composition of the fine is transparent. The phases setting the two factors are to be independent; nonetheless, the judge is not expected to carry out his computations without due consideration for the final product.<sup>47</sup> Moreover, the number of day-fine units may neither exceed 360 nor be fewer than five,<sup>48</sup> and the value of each unit must be less than 10,000 marks and greater than two marks.<sup>49</sup> Thus, the total fine for a single offense<sup>50</sup> can fall between ten and 3,600,000 marks.

The net daily income of the offender for purposes of computation is the sum of all revenues derived from salary, dividends, interest, pensions, and welfare benefits,<sup>51</sup> less taxes, insurance premiums, and, for the self-employed, business expenses and losses.<sup>52</sup> Difficulties arise when the offender has a low income or no income at all, as with individuals who give up their jobs in anticipation of

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könnte.").

<sup>43</sup> See *id.*

<sup>44</sup> See A. SCHÖNKE & H. SCHRÖDER, STRAFGESETZBUCH KOMMENTAR (criminal code & commentary) § 40 Rdn. 8 (20th ed. 1980); Tröndle, *Verhängung in Tagessätzen*, in STRAFGESETZBUCH LEIPZIGER KOMMENTAR § 40 Rdn. 19 (H.-H. Jescheck, W. Russ & G. Willms eds. 10th ed. 1978).

<sup>45</sup> This is a reasonable assumption in light of the practice in Sweden of setting each day-fine unit equal to one one-thousandth of the offender's annual income, which is approximately equal to one-third of one day's income. See Thornstedt, *supra* note 3, at 309.

<sup>46</sup> StGB § 40(4).

<sup>47</sup> See A. SCHÖNKE & H. SCHRÖDER, *supra* note 44, § 40 Rdn. 5; Tröndle, *supra* note 44, § 40 Rdn. 16.

<sup>48</sup> StGB § 40(1).

<sup>49</sup> *Id.* § 40(2).

<sup>50</sup> For multiple offenses, the number of day-fine units may not exceed 720. *Id.* § 54(2). Thus, the absolute upper limit to the day-fine amount is 7.2 million marks.

<sup>51</sup> See Grebing, *supra* note 16, at 101; Tröndle, *supra* note 44, § 40 Rdn. 22.

<sup>52</sup> See Grebing, *supra* note 16, at 101; Tröndle, *supra* note 44, § 40 Rdn. 23.



a fine, students, housewives, and the chronically unemployed, but it is possible to impute income in such circumstances.<sup>53</sup> Even in the more typical case, where the offender is employed, it can be difficult to calculate his net daily income. A West German offender cannot be compelled to provide the court with financial information.<sup>54</sup> The court thus must depend on the defendant's voluntary disclosure of income and on the public prosecutor's report informing the court of the offender's occupation, education, and residence.<sup>55</sup> If the offender works in a profession characterized by wage uniformity, the information in the report may be enough to identify his income.<sup>56</sup> The offender may be more willing to disclose his income if the court exercises its authority to clear the courtroom when personal financial matters are being discussed.<sup>57</sup> Similarly, because the court is permitted to estimate the personal and economic circumstances of an offender,<sup>58</sup> fear of an overestimate may induce an offender to provide the court with income information.<sup>59</sup>

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<sup>53</sup> Much writing has been devoted to methods of ascribing income in such circumstances. Some commentators recommend assigning a hypothetical or potential income to students and people who give up their jobs in anticipation of a fine. See, e.g., A. SCHÖNKE & H. SCHRÖDER, *supra* note 44, § 40 Rdn. 11. But see Tröndle, *supra* note 44, § 40 Rdn. 31 (students generally have income equal to sum of wages, allowance from parents, and state support). One suggestion is that a housewife should be assigned an income equal to the actual support she receives from her husband during marriage, see A. SCHÖNKE & H. SCHRÖDER, *supra* note 44, § 40 Rdn. 11a, while another proposes that a housewife's income be assigned the value of a hypothetical support claim she could secure from her husband if they separated, see Grebing, *supra* note 16, at 103-06. See also Tröndle, *supra* note 44, § 40 Rdn. 28 (a support claim may differ substantially from the amount a housewife receives from her husband while married). In the case of an unemployed offender, the court might assign an income equal to welfare benefits plus imputed income obtained in the form of food and lodging donated by others. See Grebing, *supra* note 16, at 107.

<sup>54</sup> See A. SCHÖNKE & H. SCHRÖDER, *supra* note 44, § 40 Rdn. 19. The Alternative Draft, *supra* note 17, § 49, would have authorized courts to obtain information from banking and financial institutions about the offender's income, and, if the information were insufficient, the courts would have been permitted to estimate the income and adjust the fine accordingly. E 1962 also would have permitted income estimation, E 1962, *supra* note 13, § 51(3), but it did not direct the court to outside sources. A more recent legislative proposal would have required administrative agencies to release the offender's financial records and tax returns, Entwurf eines Einführungsgesetzes zum Strafgesetzbuch [EGStGB] (Draft of a prefatory law to the criminal code) art. 19, No. 51, BTDrucks. 7/550, at 300-01 (W. Ger. 1975), but the proposal was defeated in the drafting stage, see A. SCHÖNKE & H. SCHRÖDER, *supra* note 44, § 40 Rdn. 19; Grebing, *supra* note 16, at 117.

<sup>55</sup> See generally J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 71 (1977).

<sup>56</sup> In West Germany, large national unions can set pay scales on an industrywide basis by means of comprehensive wage agreements termed "Tarifverträge." See generally CREIFELDS RECHTSWÖRTERBUCH 1088-89 (4th ed. 1976).

<sup>57</sup> Gerichtsverfassungsgesetz [GVG] § 172(2) (W. Ger. 1975); see A. SCHÖNKE & H. SCHRÖDER, *supra* note 44, § 40 Rdn. 19.

<sup>58</sup> StGB § 40(3).

<sup>59</sup> See A. SCHÖNKE & H. SCHRÖDER, *supra* note 44, § 40 Rdn. 20.

But if the offender does not supply the court with information about his income, and his profession is not one characterized by wage uniformity, it is difficult for a court to set an accurate fine.<sup>60</sup>

The West German Criminal Code in all cases grants the court discretion to adjust the time period for payment of the day-fine. If an immediate lump sum payment cannot reasonably be expected from the offender, the court may order installment payments or set a grace period before collection.<sup>61</sup> If an offender does not pay his fine, the Code allows the fine to be converted into a prison sentence at the "exchange rate" of one day in prison for each day-fine unit.<sup>62</sup> The Code does not, however, give the offender the prerogative to serve his sentence in prison rather than satisfy the fine. The fine is the primary sanction, and the enforcement agency is authorized to garnish wages and attach property in order to collect the court-prescribed fine.<sup>63</sup> Only when all these devices fail may the

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<sup>60</sup> Either party may request appellate review of the trial court's determination of the total fine amount. See Tröndle, *supra* note 44, § 40 Rdn. 79. An appellate court may on request separately review the trial court's determination of the value of the day-fine unit. *Id.* § 40 Rdn. 76. Under the prevailing view, however, the appellate court may not separately review the trial court's determination of the number of day-fine units. *Id.* § 40 Rdn. 77.

If the defendant, or the public prosecutor acting in favor of the defendant, requests appellate review, then the appellate court is subject to the so-called prohibition on worsening ("*Verschlechterungsverbot*"), under which the review may not result in a total fine amount exceeding that imposed by the trial court. Strafprozessordnung (code of criminal procedure) [StPO] §§ 331, 358(2), 373(2) (W. Ger. 1979). Thus, if the trial court imposes a 600 DM fine (20 units at 30 DM per unit) and the appellate court reduces the number of units to 15, then the appellate court may revalue the day-fine unit at a maximum of 40 (15 x 40 = 600) even if the offender's income increases in the meantime so as to justify setting the day-fine unit at 70 DM. Tröndle, *supra* note 44, § 40 Rdn. 79. In no event may the appellate court increase the number of day-fine units; such an increase would constitute a *per se* violation of the prohibition on worsening because the number of day-fine units potentially is convertible into days of default imprisonment. *Id.*

<sup>61</sup> StGB § 42.

<sup>62</sup> *Id.* § 43.

<sup>63</sup> The procedure for fine collection in pertinent part is as follows. The offender is given notice to pay, with two weeks allowed for payment. If payment does not follow, the offender is issued a second warning. Upon the offender's failure to heed the warnings, the enforcement authority ("*Vollstreckungsbehörde*") is authorized to allow installment payments or to reduce the fine amount. If payment still does not follow, the enforcement agency may execute against the offender's real and personal property. The enforcement agency must use the method of execution most expedient to collection of the fine with due consideration to the personal circumstances of the offender and his dependents. Accordingly, the enforcement authority rarely executes against real property because this method is both cumbersome for the authority and burdensome for the offender's dependents. When attachment efforts fail to yield satisfactory amounts, default imprisonment follows as the enforcement technique of last resort. See LÖWE-ROSENBERG, *DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ: GROSSKOMMENTAR* (criminal procedure code, judiciary act & commentary) § 459 (23d ed. 1978).

enforcement agency convert the sanction to a prison sentence.<sup>64</sup>

## II. GERMANY'S EXPERIENCE FOLLOWING THE REFORMS

Statistics for the years since the reforms reveal that West Germany has succeeded in significantly reducing the number of short-term prison sentences. The reforms also have been successful in achieving a low rate of fine payment default. As this part demonstrates,<sup>65</sup> however, West German sentencing and fining practices may not have changed as much as some of the reformers had hoped they would.

### A. Reduced Reliance on the Short-Term Prison Sentence

Measured solely in terms of reduced reliance on short-term incarceration as a sanction, the First Criminal Law Reform Act must be termed a success. Before the Act, in 1965, a myriad of offenses, such as embezzlement,<sup>66</sup> incitement to riot,<sup>67</sup> adultery,<sup>68</sup> conducting a gambling operation,<sup>69</sup> and some degrees of manslaughter,<sup>70</sup> were punishable by prison sentences of six months or less. In fact, eighty-five percent of all prison sentences in 1966 were for a period of six months or less.<sup>71</sup> In 1968 the total number of such sentences was 113,273, but in 1970, the first year after the Reform Act, the number of nonsuspended prison sentences for a term of up to six months had dropped to 23,664.<sup>72</sup> By 1979 the number of nonsuspended sentences declined to 10,609.<sup>73</sup> In that year, fines consti-

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<sup>64</sup> StPO § 459(e)(2).

<sup>65</sup> This part is based largely on the findings of the Max Planck Institute for Foreign and International Criminal Law, Freiburg im Breisgau, West Germany, as reported in H.-J. ALBRECHT, *supra* note 31.

<sup>66</sup> A. SCHÖNKE & H. SCHRÖDER, *supra* note 44, § 246 (12th ed. 1965) (maximum five-year sentence).

<sup>67</sup> *Id.* § 130 (minimum three-month sentence).

<sup>68</sup> *Id.* § 172 (maximum six-month sentence).

<sup>69</sup> *Id.* § 284 (maximum six-month sentence).

<sup>70</sup> *Id.* § 228 (manslaughter with mitigating circumstances) (minimum three-month sentence).

<sup>71</sup> Quensel, *Kurze Freiheitsstrafen: Das Dilemma der Strafrechtsreform*, in MISSLINGT DIE STRAFRECHTSREFORM? 108, 108 (J. Baumann ed. 1969). The burden on West German prisons was correspondingly high. In 1966, more than 40% of West German prisoners were held in "community cells." *Id.* at 113. One-half of all such inmates were serving short-term sentences. *Id.* The frequent committals and discharges of prisoners serving short-term sentences added greatly to the bureaucratic costs of the prison system. *Id.*

<sup>72</sup> ANTWORT DER BUNDESREGIERUNG (answer of the federal government), BTDRUCKS. 7/1089, at 2 (W. Ger. 1973), reprinted in Gillespie, *supra* note 7, at 21.

<sup>73</sup> STATISTISCHES BUNDESAMT, RECHTSPFLEGE (Reihe 3, Strafverfolgung 1979) 72-73 (1980) (Table 6) [hereinafter cited as RECHTSPFLEGE 1979]. In addition to the 10,609 short-

tuted about eighty-two percent, nonsuspended short-term sentences about two percent, and suspended short-term sentences about eight percent of all sentences imposed in West Germany.<sup>74</sup>

Reduction in the total number of short-term prison sentences does not exhaust the goals of those reformers, such as the authors of the Alternative Draft, who sought to eliminate the short-term prison sentence for all crimes. Statistics reveal that imprisonment tends to be used disproportionately as the sanction for certain crimes. In 1972 over seventy percent of the fines imposed by West German courts were for traffic crimes, such as reckless and drunk driving.<sup>75</sup> Conversely, sentences for theft accounted for a disproportionately large fraction of all prison sentences imposed by West German courts.<sup>76</sup> Battery and fraud similarly were sanctioned in large measure by imprisonment.<sup>77</sup> This distribution suggests that West German courts persist in perceiving crimes such as theft, battery, and fraud as crimes for which the fine is an inappropriate sanction.

Table 1 indicates the distribution of fines and prison sentences for the above-mentioned offenses in 1972.<sup>78</sup> The table reveals that West German courts rarely sanction offenders convicted of theft, battery, or fraud with high fines (fines above 1000 marks). The prison sentence and the low fine are the principal sanctions for those offenders. Courts are willing to impose fines for petty forms of theft, battery, and fraud. For serious forms of those crimes, the offenses for which there is competition between high fines and imprisonment as a sanction, courts persist in imposing the latter. This contrasts with the sanctioning pattern for serious traffic offenses, for which courts consider the high fine an appropriate sanction.

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term sentences, West German judges handed down 39,815 suspended sentences in 1979. *Id.*

<sup>74</sup> See *id.*

<sup>75</sup> H.-J. ALBRECHT, *supra* note 31, at 72.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* See *infra* Table 1 and note 78.

<sup>78</sup> Table 1, in text, is adapted from, and uses statistics provided by, a similar table in H.-J. ALBRECHT, *supra* note 31, at 73. The statistics on those people sentenced to prison are somewhat ambiguous for the purposes of this comment because the table does not make clear whether the term "*Freiheitsstrafe*" (imprisonment) includes prison sentences of over six months. The point is significant since the First Criminal Law Reform Act discouraged imposition only of sentences under six months. Statistics drawn from an independent source that does distinguish between short- and long-term imprisonment, however, reveal the same trend. See RECHTSPFLEGE 1979, *supra* note 73, at 72-75 (Tables 6 & 7); STATISTISCHES BUNDESAMT, RECHTSPFLEGE (Reihe 3, Strafverfolgung 1976) 70-73 (1977) (Tables 6 & 7) [hereinafter cited as RECHTSPFLEGE 1976]. Statistics from the years 1979 and 1976 are summarized in the following tables:

TABLE 1

Distribution of Penalties for Certain Offenses in 1972

		Crime				
		Theft	Battery	Fraud	Reckless Driving	Drunk Driving
Fine in Marks	0-500	52.2%	46.8%	42.1%	7.5%	11.2%
	501-1000	9.6%	24.2%	14.9%	43.9%	45.8%
	1000 or more	4.1%	12.1%	7.0%	38.2%	32.3%
Prison Sentence		33.7%	16.9%	36.0%	10.4%	10.8%

SOURCE: H.-J. ALBRECHT, *supra* note 31, at 73 (based on survey conducted in Baden-Württemberg).

In summary, the First Criminal Law Reform Act has reduced West Germany's reliance on short-term imprisonment as a sanction. Nevertheless, a fairly large proportion of offenders convicted of certain offenses, perhaps identifiable as classic prison offenses, are punished with a prison sentence, not with a fine. The reform's

		1979			
Sanction		Crimes Against the Person		Traffic Crimes	
30 day-fine units or less		21,391	(47.4%)	166,549	(58.3%)
31 to 180 day-fine units		8,415	(18.7%)	90,423	(31.6%)
Imprisonment of six months or less		10,356	(23.0%)	25,152	(8.8%)
Other		4,940	(10.9%)	3,630	(1.3%)
Total		45,102		285,754	

SOURCE: Derived from RECHTSPFLEGE 1979, *supra* note 73, at 72-75 (Tables 6 & 7).

		1976			
Sanction		Crimes Against the Person		Traffic Crimes	
30 day-fine units or less		22,555	(49.4%)	191,614	(67.1%)
31 to 180 day-fine units		6,310	(13.8%)	68,441	(24.0%)
imprisonment of six months or less		11,023	(24.1%)	22,571	(7.9%)
Other		5,815	(12.7%)	2,834	(1.0%)
Total		45,703		285,460	

SOURCE: Derived from RECHTSPFLEGE 1976, *supra*, at 70-73 (Tables 6 & 7).

compromise of discouraging but not forbidding the imposition of short-term prison sentences probably has led to this result. As Jürgen Baumann has written, "if one really wants to eliminate the short jail sentence, a solution such as the one proposed in section 36 of the Alternative Draft [no sentences under six months] cannot be avoided."<sup>79</sup>

#### B. Accurate Adjustments of the Fine to the Economic and Personal Circumstances of the Offender

The Second Criminal Law Reform Act instituted a formalized method of adjusting fines to the economic and personal circumstances of the offender.<sup>80</sup> The Max Planck Institute for Foreign and International Criminal Law conducted an investigation into the effectiveness of the Act. Figure 1 presents the distribution of fines that the Institute found before and after the 1975 reform.<sup>81</sup> Figure 1 suggests that the reform had little effect on the distribution of fines below 1500 marks, but fines above 1500 marks increased noticeably after the new law took effect. There may be two explanations for the change in the distribution of fines. First, the reforms may have had their desired effect of burdening more affluent offenders with progressively higher fines.<sup>82</sup> Second, rather than punishing offenders according to their economic circumstances, the courts may simply have begun to punish particular crimes more harshly.<sup>83</sup> The second explanation, however, is foreclosed by data from the Max Planck Institute study that show that the part of the fine keyed to the offender's circumstances, not the part keyed to the severity of the crime, was the element that changed.<sup>84</sup>

That the larger number of high fines is explained by reference to the offender's income does not prove that the Second Criminal Law Reform Act is a success. The Act sought not only to adjust fines to the economic circumstances of the offender, but to do so accurately as well.<sup>85</sup> To evaluate the accuracy of such adjustments,

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<sup>79</sup> ALTERNATIVE DRAFT, *supra* note 17, at 37 (commentary of J. Baumann).

<sup>80</sup> See *supra* notes 42-45 and accompanying text.

<sup>81</sup> H.-J. ALBRECHT, *supra* note 31, at 202.

<sup>82</sup> *Id.* at 203.

<sup>83</sup> *Id.*

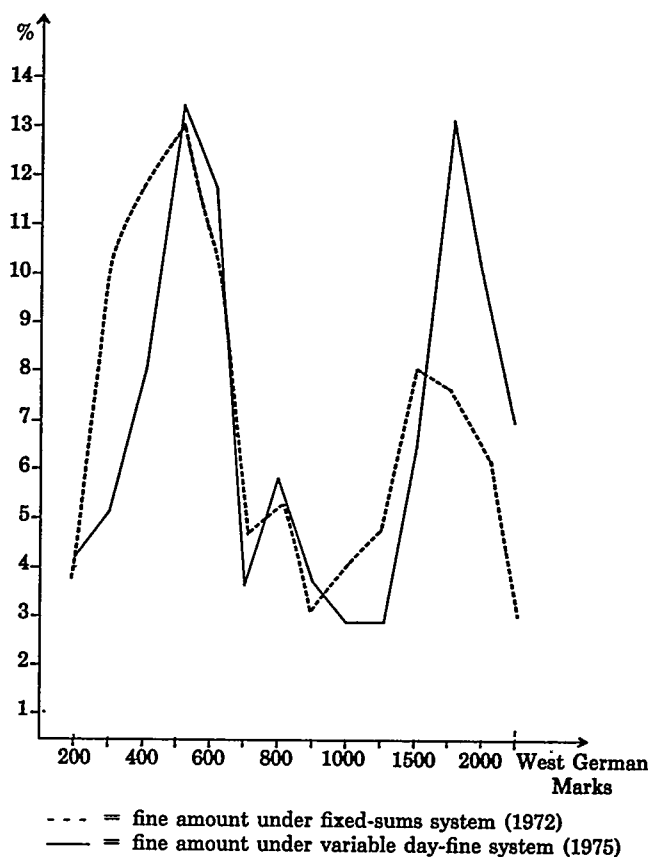
<sup>84</sup> See *id.* The distribution of the number of day-fine units, the component of the fine based on the culpability of the offender, see *supra* notes 40-41 and accompanying text, imposed during 1975 correlates with the distribution of the number of days of default imprisonment, also a measure of culpability, imposed in 1972 under the old system. See H.-J. ALBRECHT, *supra* note 31, at 203 (Graph 5).

<sup>85</sup> See generally *supra* notes 32, 42-44 and accompanying text.

the Institute surveyed the information to which a sample of West German courts had access when calculating fines.

FIGURE 1

DISTRIBUTION OF FINES, 1972 AND 1975



SOURCE: H.-J. ALBRECHT, *supra* note 31, at 202.

The Institute's study revealed that in over fifty-four percent of the cases in which a court imposed a day-fine the court had no information about the defendant's income.<sup>86</sup> In over seventy-five percent of the cases, the court had no information about the defen-

<sup>86</sup> H.-J. ALBRECHT, *supra* note 31, at 204. The study also revealed that willingness to provide information about income varies among professions. Unskilled workers were the most likely to provide information; the self-employed were the least likely to do so. *See id.* at 178 (Table 76).

dant's wealth.<sup>87</sup> In only 1.7% of the surveyed cases did the court or state prosecutor's office make a supplementary investigation into the defendant's income or wealth.<sup>88</sup>

In those cases in which the defendant's economic circumstances were known to the court, the value of the day-fine unit did vary in proportion to income.<sup>89</sup> In those cases in which the court lacked information about the defendant's economic circumstances, the Institute could not discover the factors that determined the valuation of the day-fine unit. The Institute surmised, however, that the defendant's profession and marital status were the chief factors affecting the choice of a value.<sup>90</sup>

The court's lack of information about offender income and wealth in over one-half of the cases in which a day-fine is imposed undercuts two of the goals of the Second Criminal Law Reform Act. First, West German courts cannot impose a fine whose culpability and income components are trustworthy when they have no information concerning income.<sup>91</sup> Second, the lack of information about an offender's income undermines the goal of effecting equality in the impact of fines.<sup>92</sup> When a court guesses the income of an offender, there is a large margin for error, and the resulting fine can be inadequate or overly burdensome.

Not all goals of the day-fine adjustment method have been undermined by the dearth of information before the courts about offender income. The goal of fine collection<sup>93</sup> has been met. The Max Planck study shows that nearly fifty percent of all day-fines are paid immediately.<sup>94</sup> Slightly more than thirty percent are paid following the grant of an installment or delayed payment schedule. Attachment of property is ordered in approximately eleven percent

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<sup>87</sup> *Id.* at 205.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 209. Downward adjustment of the day-fine is well established in West Germany. For example, judges frequently reduce the day-fine after considering the offender's support obligations. See Tröndle, *supra* note 44, § 40 Rdn. 41. The theory underlying this practice is that an offender without dependents should not receive better treatment, in effect, than one who earns a like salary but supports others. Grebing, *supra* note 16, at 108. The Criminal Code does not indicate whether the court may further increase the amount of the day-fine for an offender with large personal wealth not represented in his income. Tröndle, *supra* note 44, § 40 Rdn. 52.

<sup>90</sup> H.-J. ALBRECHT, *supra* note 31, at 210-14.

<sup>91</sup> Although the courts must publish the two components in the sentencing order, see *supra* note 46 and accompanying text, the lack of support for the income component renders its accuracy suspect.

<sup>92</sup> Cf. *supra* note 31 and accompanying text.

<sup>93</sup> See *supra* note 32 and accompanying text.

<sup>94</sup> H.-J. ALBRECHT, *supra* note 31, at 233.



of all cases and is successful in one out of five such cases. Payment follows an official threat of imprisonment in close to eleven percent of all cases. In only about four percent of all cases do offenders serve default prison terms.<sup>95</sup> It may be that the high collection rate results from imposing fines commensurate with offenders' abilities to pay. If so, then courts may be able to adjust fines more accurately than the Institute's study otherwise would suggest, and the Second Reform Act would accordingly be more successful.

### III. A DAY-FINE SYSTEM FOR THE UNITED STATES?

West Germany's reduced dependence on short-term incarceration and its increased use of the day-fine is intriguing to the American observer critical of this country's overwhelming reliance on incarceration as a means of punishment.<sup>96</sup> In 1979, prison terms constituted approximately forty-four percent and fines only about thirteen percent of all sentences handed down by United States federal district courts.<sup>97</sup> This pattern of punishment is not unique to the American federal courts,<sup>98</sup> but it differs dramatically from West German practice. In 1979, for a wide variety of crimes, West German courts imposed prison sentences in seventeen percent of the cases and fines in eighty-two percent of the cases.<sup>99</sup> Moreover, the difficulties associated with heavy reliance on short-term im-

<sup>95</sup> *Id.*

<sup>96</sup> See *supra* notes 7-10 and accompanying text.

<sup>97</sup> Of 32,913 offenders sentenced by the federal district courts in the year ending June 30, 1979, some 14,580 received prison sentences, and 4368 were assessed fines. BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1980, at 434-35 (1980) (Table 5.24) [hereinafter cited as CRIMINAL JUSTICE STATISTICS]. Of the offenders sent to prison, 2320 received sentences of 1 to 12 months. *Id.*

<sup>98</sup> For example, in 1974, the Superior Court of Washington, D.C. imposed a prison sentence on 36% but a fine on only 6% of all convicted defendants. Gillespie, *supra* note 7, at 25 (Table 3). American state laws currently permit sentencing judges to impose short-term sentences for offenses such as simple assault, see, e.g., N.M. STAT. ANN. § 30-3-1 (1978) (petty misdemeanor, for which the code permits a sentence of six months or less, *id.* § 31-19-1(B)), adultery, see, e.g., Criminal Code of 1961, § 11-7, ILL. REV. STAT. ch. 38, § 11-7 (1981) (class A misdemeanor for which the code permits a sentence of less than one year, *id.* § 1005-8-3(a)(1)), and petty theft, see, e.g., *id.* § 16-1(e)(1) (class A misdemeanor).

<sup>99</sup> See RECHTSPFLEGE 1979, *supra* note 73, at 72-73. For specific crimes, the contrast between the United States and West Germany is particularly striking. In 1979, West German courts imposed a fine on about 66% of those convicted of a broad range of assault-type offenses. See *id.* In 1979, United States district courts imposed a fine on fewer than 8% of the criminal defendants convicted of assault. See CRIMINAL JUSTICE STATISTICS, *supra* note 97, at 434-35. Similarly, approximately 76% of the German defendants convicted of theft, larceny, or embezzlement in 1979 were fined, see RECHTSPFLEGE 1979, *supra* note 73, at 72-73, whereas just over 5% of the American defendants sentenced for the same group of offenses incurred a fine, see CRIMINAL JUSTICE STATISTICS, *supra* note 97, at 434-35.

prisonment (e.g., overcrowded prisons and the severing of social ties that lead to rehabilitation) noted in West German reform literature of the 1960's<sup>100</sup> are present today in the American criminal justice system.<sup>101</sup>

Nevertheless, it is premature to conclude that West Germany's success justifies adoption of the West German system by United States jurisdictions. A legislature might not want to adopt the day-fine system if fines prove less successful than imprisonment in deterring crime or recidivism.<sup>102</sup> Inquiry into such matters is beyond the scope of this comment. Presumably, however, a day-fine is an adequate sanction for at least those crimes already punishable by fine in this country,<sup>103</sup> and one can assess the chances of success of a day-fine system for those crimes in the United States.<sup>104</sup>

The West German Criminal Law Reform Acts have fallen short of their goals in three ways. First, they have not succeeded in eliminating short-term imprisonment as a significant sanction for at least some crimes.<sup>105</sup> Second, it is difficult for West German courts to impose fines whose income components accurately reflect an offender's income. Finally, because of this difficulty it is not clear that the courts have been able to effectuate the goal of imposing an equal impact on offenders of varied incomes convicted of the same crime.<sup>106</sup> This part identifies two considerations that would make the operation and effect of a day-fine system different in United States jurisdictions than in West Germany: the American courts' access to information about offender income and the distribution of income within the American population.<sup>107</sup>

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<sup>100</sup> See sources cited *supra* note 16.

<sup>101</sup> See *supra* notes 8-9 and accompanying text.

<sup>102</sup> For a discussion of the theories and purposes of criminal sanctions, see generally W. LAFAVE & A. SCOTT JR., *HANDBOOK ON CRIMINAL LAW* § 5 (1972).

<sup>103</sup> *E.g.*, MICH. COMP. LAWS § 257.901 (1979) (misdemeanor violation of the Vehicle Code punishable by fine and/or imprisonment); N.Y. PENAL LAW § 60.01(3) (McKinney 1975) (misdemeanor punishable by fine and/or imprisonment).

<sup>104</sup> Under the laws of many states, courts imposing fines are to take the offender's ability to pay into account when setting the fine amount. See, *e.g.*, Unified Code of Corrections § 5-9-1(d), ILL. REV. STAT. ch. 38, § 1005-9-1(d) (1981) ("In determining the amount and method of payment of a fine, the court shall consider . . . the financial resources and future ability of the offender to pay the fine . . ."). This rough adjustment to offender income corresponds to the West German fining practice prior to the Second Criminal Law Reform Act. See *supra* notes 36-37 and accompanying text.

<sup>105</sup> See *supra* notes 75-79 and accompanying text.

<sup>106</sup> See *supra* notes 85-92 and accompanying text.

<sup>107</sup> It is also worth considering the possibility that any large-scale system of fines ultimately may use imprisonment to cope with payment defaults. Imprisonment of indigents in default could raise equal protection problems in the United States. See *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970). In *Williams* an indigent defendant

## A. Access to Income Information

The West German federal parliament has refused to vest criminal courts with the power to compel an offender to disclose his income.<sup>108</sup> Without such data, it is difficult for the courts to impose a fine commensurate with the offender's means. This frustrates the goals of equal impact on equally culpable criminals and clear delineation of the culpability and income components of the day-fine.<sup>109</sup> American courts should have an easier time calculating accurate awards because they have greater access to information about an offender's income.

American law and practice provide sentencing judges with a considerable amount of information about an offender. For example, Federal Rule of Criminal Procedure 32(c) directs the probation service to conduct a presentence investigation of the offender

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convicted of theft was sentenced to the statutory maximum of one year's imprisonment and a \$500 fine, plus five dollars in court costs. After he completed the one-year prison term, the offender was unable to satisfy the fine. Pursuant to an Illinois statute, he then was imprisoned for an additional 101 days to "work off" the fine at the rate of five dollars per day. The Supreme Court held the practice of fine conversion unconstitutional because the "Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum." *Williams*, 399 U.S. at 242.

In *Tate v. Short*, the Court confronted the case of an indigent convicted of an offense that carried only a monetary sanction. The Texas state court had committed the indigent offender to prison pursuant to a Texas statute that allowed imprisonment if an offender was incapable of paying a fine. The Court struck down the practice:

Since Texas has legislated a "fines only" policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment.

*Tate*, 401 U.S. at 399.

In neither *Tate* nor *Williams* did the Court preclude the use of default imprisonment. See *Tate*, 401 U.S. at 400-01 (the determination of the constitutionality of default imprisonment when alternative means of enforcement are unsuccessful must "await the presentment of a concrete case"); *Williams*, 399 U.S. at 243-44 ("We have no occasion to reach the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction."). It is possible that the Court would find default imprisonment unconstitutional, but that result is far from certain. Even if the Court were to do so, however, a day-fine system would still be possible. It is not the fine that would be unconstitutional, and alternative means of handling defaults might be found. Hence the potential equal protection problems of default imprisonment by themselves should not rule out the use of the day-fine in the United States.

<sup>108</sup> See *supra* note 54 and accompanying text.

<sup>109</sup> See *supra* notes 91-92 and accompanying text.

and to present it to the sentencing court.<sup>110</sup> The report must contain, *inter alia*, "such information about [the offender's] . . . financial condition as may be helpful in imposing sentence."<sup>111</sup> The Supreme Court has cited rule 32 for the proposition that before imposing sentence a federal judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."<sup>112</sup> Likewise, the Organized Crime Control Act of 1970 provides that courts may receive background information about an offender without limit for purposes of determining an appropriate sentence.<sup>113</sup> The statute has been interpreted to allow federal courts to consider otherwise inadmissible evidence in the sentencing process.<sup>114</sup>

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<sup>110</sup> FED. R. CRIM. P. 32(c). The presentence report is mandatory unless, "with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion." *Id.* 32(c)(1).

<sup>111</sup> *Id.* 32(c)(2). The rule provides in full:

The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

*Id.* Such reporting is not unique to the federal courts. Illinois presentence reports, for example, must set forth "(1) the defendant's history of delinquency or criminality, physical and mental history and condition, family situation and background, economic status, education, occupation and personal habits; . . . and (6) any other matters . . . the court directs to be included." Unified Code of Corrections § 5-3-2(a), ILL. REV. STAT. ch. 38, § 1005-3-2(a) (1981).

<sup>112</sup> *United States v. Tucker*, 404 U.S. 443, 446 (1972) (citations omitted). The reporters cite this statement to FED. R. CRIM. P. 32(a)(2), not FED. R. CRIM. P. 32(c)(2). *Tucker*, 404 U.S. at 447; 92 S. Ct. 589, 591; 30 L. Ed. 2d 592, 596. This is an obvious typographical error; the Court could not have been referring to rule 32(a)(2), which provides for notification to the defendant of his right to appeal. More recently, the Court quoted approvingly the quotation in text, calling it a "fundamental sentencing principle." *United States v. Grayson*, 438 U.S. 41, 50 (1978).

<sup>113</sup> Organized Crime Control Act of 1970, § 1001(a), 18 U.S.C. § 3577 (1976) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for purposes of imposing an appropriate sentence."). The statutory scheme set up by the Act provides for special increased sentences for "dangerous special offenders," 18 U.S.C. § 3575 (1976 & Supp. V 1981), but the prerogative of a federal court to inquire into the defendant's background has not been extended to cases in which the defendant is not a "dangerous special offender." See *United States v. Garcia*, 544 F.2d 681, 684 (3d Cir. 1976).

<sup>114</sup> See, e.g., *Smith v. United States*, 551 F.2d 1193, 1196 (10th Cir.) (court may consider history of prior arrests), *cert. denied*, 434 U.S. 830 (1977); *United States v. Lee*, 540 F.2d 1205, 1210 & n.11 (4th Cir.) (court may consider unlawfully seized evidence), *cert. denied*, 429 U.S. 894 (1976); cf. *United States v. Grayson*, 438 U.S. 41, 50 (1978) (court may consider defendant's false trial testimony in fixing sentence).

These provisions suggest that at least federal courts already have the authority to order the production of the offender's tax return to facilitate sentencing,<sup>115</sup> but under current law the Internal Revenue Service is not permitted to disclose tax returns in such circumstances.<sup>116</sup> Other sources are available. It is likely, for example, that courts possess the authority to compel disclosure of financial documents from the defendant's accountant<sup>117</sup> or attorney.<sup>118</sup> They also probably could compel the offender to produce his own tax returns, for purposes of sentencing, without violating the fifth amendment's protection against compelled self-incrimination.<sup>119</sup> In sum, American criminal law presupposes an active fact-

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<sup>115</sup> Even if a particular state's statutes do not currently extend similar powers to trial judges to compel production of tax returns, the West German experience might convince the state's legislature to confer such power on state court judges if it adopts the day-fine sanction.

<sup>116</sup> State officials are entitled to federal returns only to the extent necessary to administer the state's tax laws. I.R.C. § 6103(d) (Supp. V 1981). As for federal courts, returns or return information

may be entered into evidence in any administrative or judicial proceeding pertaining to enforcement of a specifically designated Federal criminal statute (not involving tax administration) . . . but . . . *only if* the court finds that such return or return information is probative of a matter in issue *relevant in establishing the commission of a crime or the guilt of a party*.

I.R.C. § 6103(i)(4) (1976) (emphasis added).

<sup>117</sup> See *United States v. Couch*, 409 U.S. 322, 328-29 (1973). In *Couch*, the Court upheld over fifth amendment objections a court order compelling a defendant's accountant to produce all of the defendant's financial statements in the accountant's possession. The Court's reasoning in upholding the order was that "[t]he Fifth Amendment privilege is a personal privilege: it adheres basically to the person, not to the information that may incriminate him." *Id.* at 328. Because the accountant, not the defendant, was "the only one compelled to do anything," coercion "against a potentially accused person [was] absent." *Id.* at 329.

<sup>118</sup> Under the holding of *Fisher v. United States*, 425 U.S. 391 (1976), courts can compel a defendant's attorney to produce financial working papers concerning the defendant and prepared by a third party. The fifth amendment did not preclude disclosure in *Fisher* because the papers "were not prepared by the taxpayer, and [because] they contain[ed] no testimonial declarations by him." *Id.* at 409. Nor were the documents protected by the attorney-client privilege, because "documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer" of the papers to him. *Id.* at 403.

<sup>119</sup> U.S. CONST. amend. V. Although no case directly addresses this point, it is supported by the Court's repeated finding that the sentencing process is subject to less exacting constitutional scrutiny than are the pretrial and trial processes. See, e.g., *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959) ("once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistent with the due process clause of the fourteenth amendment, consider unsworn . . . information"); *Williams v. New York*, 337 U.S. 241, 246-48 (1949) (the historical separation of sentencing and guilt determination procedures, as well as sound practical reasons, support the relative laxity of evidentiary rules in sentencing as compared to trial procedure). The Court also has held that the guarantee of U.S. CONST. amend. V

finding role for the judge during sentencing. Because income information is likely to be available to the court from tax returns or elsewhere, a court in the United States should be able to calculate day-fines more accurately than can a West German court.

## B. Economic Incentives

The advantages of day-fine adjustment—transparent calculation, equality of the impact of the fine, and lowered probability of default in payments—are desirable only if they can be effected without diminishing the economic disincentive to crime created by the penalties of the criminal law. The practice of adjusting the day-fine to the offender's income can change the economic incentives facing a potential criminal. An example illustrates the problem. Suppose that a person is assessing the consequences of committing a crime from which he would gain \$10,000 if successfully completed. The would-be criminal draws the potential fine and the probability of being convicted into his assessment:<sup>120</sup>

$$\text{Expected Gain} = (\text{Probability of Success}) \times (\text{Potential Benefit}) - (\text{Probability of Conviction}) \times (\text{Potential Fine}).$$

If he anticipates a forty percent chance of being sentenced to an \$18,000 day-fine, he should expect a net \$1200 loss,<sup>121</sup> and hence he will face an economic disincentive to commit the crime. If the potential criminal is less well-off, however, and he knows he will face a day-fine of only \$13,000, he can expect a net gain of \$800 from the deed.<sup>122</sup> More generally, when an individual's income is below some threshold, he will face an economic incentive to commit certain crimes, and the incentive increases with diminishing income.

This skewing of incentives by an income-adjusted day-fine system results from the fact that the potential benefit of a crime is a constant value, but the potential cost of a crime decreases with diminishing income. The skewing effect is most acute when the day-fine is imposed on low-income offenders. Perhaps the reason

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against self-incrimination is limited to "protect[ion] against 'compelled self-incrimination, not [the disclosure of] private information.'" *Fisher v. United States*, 425 U.S. 391, 401 (1976) (quoting *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975)). Hence the fifth amendment should pose no bar to compelled production of a tax return for sentencing purposes: because the court would be using the records for sentencing and not to determine liability, the records would not be incriminating.

<sup>120</sup> See generally R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* § 7.2 (2d ed. 1977); Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

<sup>121</sup> Expected Gain =  $(0.6 \times \$10,000) - (0.4 \times \$18,000) = \$6000 - \$7200 = (-)\$1200$ .

<sup>122</sup> Expected Gain =  $(0.6 \times \$10,000) - (0.4 \times \$13,000) = \$6000 - \$5200 = \$800$ .

West German commentators have not noticed this incentive to crime is that West Germany enjoys substantial income homogeneity. In 1978, only 8.6% of all West German males with income had less than \$4800 net income.<sup>123</sup> In 1978, 25.3% of all American males with income had less than \$5000 in gross earnings.<sup>124</sup> West Germans' incomes are concentrated much more toward the middle of the income distribution spectrum than are Americans' incomes. In 1978, close to sixty percent of all West German males with income earned between \$7200 and \$13,200 net.<sup>125</sup> In the United States in 1978, only 30.4% of all males with income earned between \$7000 and \$15,000 gross.<sup>126</sup> In the United States, therefore, a day-fine system might create incentives for a sizeable population group to commit certain crimes. To avoid these incentives, American jurisdictions adopting a day-fine system could set a minimum fine for each offense. Minimum fines would eliminate for low-income criminals the ideal of more precise adjustments of the fines according to income, but such minimum fines would preserve the disincentive to criminal activity that criminal sanctions are intended to create. Thus although the income distribution in the United States might make it difficult to copy the West German system exactly, the presence of a large low-income population in this country does not foreclose the possibility of a successful day-fine system.<sup>127</sup>

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<sup>123</sup> See STATISTISCHES BUNDESAMT, STATISTISCHES JAHRBUCH 1979 FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 97 (1979) (Table 6.5.4) [hereinafter cited as STATISTISCHES JAHRBUCH]. This section uses statistics arrived at by converting figures stated in West German marks to American dollars at the rate of two marks to one dollar. The 2:1 conversion rate is the rounded mean rate of exchange for the years 1977 (2.10:1) and 1978 (1.83:1). *Id.* at 314 (Table 14.10).

<sup>124</sup> See BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1980, at 462 (1980) (Table 767) [hereinafter cited as STATISTICAL ABSTRACT OF THE U.S.].

<sup>125</sup> See STATISTISCHES JAHRBUCH, *supra* note 123, at 97.

<sup>126</sup> See STATISTICAL ABSTRACT OF THE U.S., *supra* note 124, at 462.

<sup>127</sup> The West German day-fine system suffers from a second economic shortcoming, which results from the Criminal Code's failure to specify the value of each day-fine unit in terms of a variable fraction of the offender's income. See *supra* note 44 and accompanying text. Without statutory guidance, it is possible that a West German judge will follow the Swedish practice, see *supra* note 45 and accompanying text, of using a fixed fraction of income. Setting the value of all offenders' day-fine units equal to a fixed fraction of income is economically unsound because it hinders imposing an equal detriment on similarly culpable offenders. The necessity of using a fraction that varies upward with income has been demonstrated in the context of progressive taxation. See W. BLUM & H. KALVEN, *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 39-45 (1953). Their arguments are equally persuasive in considering the day-fine.

In economic terms, the day-fine is intended to impose equal disutility on equally culpable offenders. Imposition of equal disutility can have either of two meanings. First, it can

## CONCLUSION

West Germany's Criminal Law Reform Acts of 1969 were intended to reduce substantially the use of short-term prison sentences, to impose sanctions that burden equally culpable people in equal fashion and with a clear connection to the criminal's culpability, and to establish a method of calculating fines such that all offenders would be able to pay them. In some respects, the reforms have met their goals: short-term imprisonment is now the exception rather than the rule; the fines apparently are adjusted according to the income of the offender whenever possible; virtually all offenders pay their fines. In other respects, the reforms have fallen short of their mark: short-term prison sentences are still common for some crimes; courts lack sufficient information to calculate accurately the component of the fine related to income; the fines do not clearly impose an equivalent burden on equally culpable offenders. Evidence concerning the effectiveness of the day-fine at deterring crime and recidivism is incomplete. It would be premature, therefore, to recommend that jurisdictions in the United States adopt the West German day-fine system, but this comment has identified some aspects of the system that could be varied to make it more successful in the United States if and when it proves desirable to adopt the day-fine here.

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mean that every offender must surrender a fixed amount of utility. *See id.* at 42. Under this definition, the fine for each crime would be the same for all offenders, regardless of their wealth. The West German day-fine does not opt for this approach. Second, imposition of equal disutility can mean that every offender must surrender a fixed percentage of the total utility he derives from money. *See id.* at 43-44. Only a variable fine can achieve this effect; exacting a fixed percentage of every offender's income will not result in the desired proportionate sacrifice. By taking a fixed percentage of every offender's income, the court can impose on the wealthy offender only a nominally greater fine than it imposes on the poor offender, because the wealthy person derives less utility from each additional dollar of income than does the poor person. *Cf. id.* at 40-41. To exact an equal percentage of the total utility that each offender derives from money, therefore, a fine must take progressively more away from each additional dollar of income. Only a progressively graduated scale, exacting ever greater percentages of pre-tax income, will produce the desired effect. *Cf. id.* at 43. Thus, if an American jurisdiction were to adopt the day-fine calculation method, and it wanted to impose equal disutility on equally culpable offenders, the jurisdiction would have to adopt a progressively graduated scale of day-fine values.